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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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U.S. Citizenship
and Immigration
Services

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Date: **NOV 15 2011** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will remain denied.

The petitioner provides software consulting and development services. It seeks to employ the beneficiary as a programmer analyst and to classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition determining that the initial proffered position is not a specialty occupation as the petitioner did not initially offer the beneficiary an in-house position and changed the offer to an in-house position in response to the director's request for evidence.

The record of proceeding before the AAO contains: (1) Form I-129, Petition for a Nonimmigrant Worker, and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B, Notice of Appeal or Motion, along with counsel's brief and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

On the Form I-129, the petitioner indicated it was established in 1998, had 115 employees, and a gross annual income of \$8,501,286. The petitioner also stated on the Form I-129 that it wished to employ the beneficiary as a programmer analyst from October 1, 2009 to September 23, 2012 at an annual salary of \$51,293. The LCA accompanying the petition was certified on March 24, 2009 for a period from September 23, 2009 until September 23, 2012 and indicated the beneficiary's place of employment as [REDACTED].

In the March 31, 2009 letter accompanying the petition, the petitioner stated that it is an information technology and management consulting firm that provides expertise in a full range of information systems, including system design, planning, development and implementation.

The petitioner noted that the individual in the proffered position would work under a project manager to design and develop software systems. The petitioner stated:

The position demands an individual that is able to analyze client requirements and plan and develop software systems based on those requirements. The Programmer Analyst, under the direction of the Project Manager, analyzes the client's data processing requirements to determine the computer software which will best serve those needs, then works on the design of a computer system using that software which will process the data in the most timely and inexpensive manner, and works on the implementation of that design, including installation of the necessary system software and its customization to the client's unique requirements.

Throughout this process the Programmer Analyst *must constantly interact with the end-user and management, explaining to it each phase of the system development process, responding to its questions, comments and criticisms, and*

modifying the system so that the concerns raised by the clients are adequately addressed.

The position of Programmer Analyst in our company is professional in nature, as the position involves consulting with clients to determine their computer system development needs and developing a satisfactory solution.

Emphasis added.

The petitioner also provided a list of the beneficiary's day-to-day duties and the time allocated to those duties:

- Consult with client to determine system requirements – 15%;
- Analyze software requirements to determine design feasibility – 10%;
- Consult with engineering staff to evaluate interface between hardware & software and performance requirements of overall system – 5%;
- Design software system, using design tools to predict outcome – 20%;
- Develop software systems, including programming, documentation and testing procedures – 40%;
- Consult with client concerning maintenance of system – 5%;
- Coordinate installation of software system – 5%.

The petitioner stated the position required a minimum of a U.S. baccalaureate degree or its equivalent in engineering, computer science, or business with a specialization in Information Systems or a closely related field. The petitioner noted that the beneficiary had a bachelor of technology degree in electrical and electronic engineering from [REDACTED] technological certifications, and extensive experience in software development.

On June 1, 2009, the director issued an RFE requesting an itinerary and the identity of each company to which the beneficiary would provide services. The director requested that the petitioner submit a letter from the end client identifying the name of the project to which the beneficiary would be assigned, the title and duties of the beneficiary's position, and contact information for the end client. The director also requested that if the beneficiary would perform work on an in-house project, the petitioner should submit evidence of the project, the length of time the beneficiary would work on the project, the team members assigned to the project, and how the beneficiary is qualified to work on the project, among other things.

In response, the petitioner stated that the beneficiary would work as a programmer analyst on an internal development project(s) at its office located in [REDACTED]. The petitioner identified the project to which the beneficiary would be assigned as the [REDACTED]. The petitioner indicated that the target market for [REDACTED] would be major chain restaurants and that once the project was ready for final release the petitioner would begin a nation-wide marketing campaign. The petitioner identified the internal technical manager of the project to whom the beneficiary would report and another programmer analyst who would also work on the project. The petitioner submitted an overview of the RSRS

project plans. The petitioner also provided an itinerary reiterating that the beneficiary would be assigned to an ongoing in-house project at the petitioner's offices and that the duration of the project would be three to four years with a delivery date in October 2012. The petitioner also noted that if it became necessary for the beneficiary to move to a new work location, the petitioner would obtain the necessary labor condition applications prior to the move.

On September 8, 2009, the director denied the petition.

On appeal, counsel for the petitioner asserts that the petitioner had always intended that the beneficiary would work on in-house software products and systems, more specifically the [REDACTED]. Counsel references the Form I-129 and notes that the petitioner never indicated that the beneficiary would be working at a location other than in [REDACTED]. Counsel contends that the end clients referred to in the petitioner's letter in support of the petition refers to the end customers who would use RSRS. Counsel avers that the petitioner would be consulting with the end user (customers of the product) and that the petitioner's use of the word "client" does not automatically mean that the beneficiary would be placed off-site instead of in-house. Counsel claims that the word "client" could also pertain to the petitioner, the beneficiary's employer and developer of the RSRS product.

The petitioner also submits an October 8, 2009 letter in support of the appeal. The petitioner states that it is currently developing three separate systems in-house and provides an overview of the two additional project plans. The petitioner states that it is not developing the RSRS project for any particular client but because of the future profit potential it is willing to invest in the research and development process. The petitioner reiterates that its intent always was to use the beneficiary's services in-house and apologizes if its initial letter in support of the petition was not clear on this point.

The record on appeal also includes an October 7, 2009 letter prepared by [REDACTED], a Professor of Computer Science at [REDACTED]. [REDACTED] opines: "the word 'client' refers to many different entities besides the traditional, off-site company to which a programmer analyst may be subcontracted" and "[i]n terms of in-house projects, the term 'client' refers to either the end product user or the company developing the product."

Upon review, the petitioner in this matter has not provided a definitive detailed description of the proffered position. The petitioner's initial description included information that the programmer analyst must constantly interact with the end-user and management and that the programmer analyst's duties involved consulting with clients to determine their computer system development needs and developing a satisfactory solution. The petitioner did not refer to any internal projects to which the beneficiary would be assigned. The generic description provided did not provide detail on any possible in-house assignment, but rather was written as if the beneficiary would be extensively involved in endclient interaction. In response to the RFE, the petitioner adds that it always intended that the beneficiary would work on an in-house project. However, such an addition in this matter, with no explanation regarding the failure to initially list the specific project to which the beneficiary would be assigned, amounts to inconsistent testimony. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will

not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Although the AAO recognizes that “client” may have different meanings, neither counsel nor the petitioner provides a credible explanation for the lack of specific information regarding the actual work the beneficiary would be doing on the in-house project, either initially or in response to the director’s RFE. Moreover, if the term “client” has different meanings in the software development industry, as asserted, the petitioner’s lack of initial specificity regarding the actual work the beneficiary would be doing and for what project or company further undermines the probative value of the petitioner’s claim regarding its initial intent for the use of the beneficiary’s services. Doubt cast on any aspect of the petitioner’s proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

Based on the inconsistency in the record regarding the actual work to which the beneficiary would be assigned, the director’s decision is affirmed.

Beyond the decision of the director the AAO reiterates that the petitioner’s description of the beneficiary’s day-to-day duties is generic and fails to convey sufficient information to ascertain that the beneficiary would be employed in a specialty occupation. Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) states, in pertinent part, the following:

Specialty occupation means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and [(2)] which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d at 387. To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The AAO notes that, as recognized by the court in *Defensor v. Meissner*, 201 F.3d at 387, where the work is to be performed for entities other than the petitioner, evidence of the client companies’ job requirements is critical. The court held that the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary’s services. *Id.* at 387-388. Such evidence must be sufficiently detailed to demonstrate the type and educational level of highly specialized knowledge in a specific discipline that is necessary to perform that particular

work. It is not possible to determine that the beneficiary's duties, even if only at the petitioner's office on a project comprise H-1B caliber work and that the H-1B caliber work would last for the duration of the petition. Further, even if the petitioner were to demonstrate, which it did not do, that the beneficiary will work as a programmer analyst on its in-house project for the duration of the petition, the petitioner has failed to demonstrate that the proffered position is a specialty occupation.

The AAO recognizes the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹

The Programmer Analyst occupational category is addressed in two chapters of the *Handbook* (2010-11 online edition) – “Computer Software Engineers and Computer Programmers” and “Computer Systems Analysts.”

The *Handbook* describes computer programmers as follows:

[C]omputer programmers write programs. After computer software engineers and systems analysts design software programs, the programmer converts that design into a logical series of instructions that the computer can follow (A section on computer systems analysts appears elsewhere in the Handbook.). The programmer codes these instructions in any of a number of programming languages, depending on the need. The most common languages are C++ and Python.

Computer programmers also update, repair, modify, and expand existing programs. Some, especially those working on large projects that involve many programmers, use computer-assisted software engineering (CASE) tools to automate much of the coding process. These tools enable a programmer to concentrate on writing the unique parts of a program. Programmers working on smaller projects often use “programmer environments,” applications that increase productivity by combining compiling, code walk-through, code generation, test data generation, and debugging functions. Programmers also use libraries of basic code that can be modified or customized for a specific application. This approach yields more reliable and consistent programs and increases programmers' productivity by eliminating some routine steps.

As software design has continued to advance, and some programming functions have become automated, programmers have begun to assume some of the responsibilities that were once performed only by software engineers. As a result, some computer programmers now assist software engineers in

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

identifying user needs and designing certain parts of computer programs, as well as other functions. . . .

* * *

[M]any programmers require a bachelor's degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business. . . .

The *Handbook's* section on computer systems analysts reads, in pertinent part:

In some organizations, programmer-analysts design and update the software that runs a computer. They also create custom applications tailored to their organization's tasks. Because they are responsible for both programming and systems analysis, these workers must be proficient in both areas. (A separate section on computer software engineers and computer programmers appears elsewhere in the Handbook.) As this dual proficiency becomes more common, analysts are increasingly working with databases, object-oriented programming languages, client-server applications, and multimedia and Internet technology.

* * *

[W]hen hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor's degree. For more technically complex jobs, people with graduate degrees are preferred. For jobs in a technical or scientific environment, employers often seek applicants who have at least a bachelor's degree in a technical field, such as computer science, information science, applied mathematics, engineering, or the physical sciences. For jobs in a business environment, employers often seek applicants with at least a bachelor's degree in a business-related field such as management information systems (MIS). Increasingly, employers are seeking individuals who have a master's degree in business administration (MBA) with a concentration in information systems.

Despite the preference for technical degrees, however, people who have degrees in other areas may find employment as systems analysts if they also have technical skills. Courses in computer science or related subjects combined with practical experience can qualify people for some jobs in the occupation. . . .

As evident in the excerpts above, the *Handbook's* information on educational requirements in the programmer analyst occupation indicates that a bachelor's or higher degree, or the equivalent, in a specific specialty is not a normal minimum entry requirement for this occupational category.

Rather, the occupation accommodates a wider spectrum of educational credentials. The *Handbook* does not indicate that programmer analyst positions normally require at least a bachelor's degree or its equivalent in a specific specialty. While the *Handbook* indicates that a bachelor's degree level of education in a specific specialty may be preferred for particular positions, the generically described position duties do not demonstrate a requirement for the theoretical and practical application of highly specialized computer-related knowledge.

As the *Handbook* indicates no specific degree requirement for employment as a programmer analyst, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. The petitioner has not submitted other documentation demonstrating that the industry's professional association or other firms or individuals routinely recruit and hire only individuals with degrees in specific disciplines.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The evidence of record does not refute the *Handbook's* information to the effect that a bachelor's degree is not required in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than programmer analyst positions that can be performed by persons without a specialty degree or its equivalent.

The petitioner claims that it has always required a bachelor's degree in a specialized field such as engineering, computer science, or business with a specialization in information systems or a closely related field for the position of programmer analyst. Such acknowledgment confirms that

the petitioner's proffered position is not a specialty occupation because it does not require a bachelor's degree in a specific discipline and allows a diverse set of educational credentials for its programmer analysts. Further, the petitioner provides no documentation in support of its claim that it always hires individuals with a bachelor's or higher degree in a specific specialty for the proffered position. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As no evidence was provided that the petitioner has a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO finds that the evidence in the record of proceeding does not support the proposition that the performance of the proposed duties requires a higher degree of IT/computer knowledge than would normally be required of programmer analysts not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The appeal will be dismissed and the petition denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. In this matter, the petitioner has not sustained its burden.

ORDER: The appeal is dismissed. The petition remains denied.